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No. 95-1104

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

KENNETH J. OWEN,

Petitioner,

v.

THE STATE BAR OF CALIFORNIA AND
THE COMMITTEE OF BAR EXAMINERS,

Respondent.

On Petition For Writ Of Certiorari
To The
SUPREME COURT OF CALIFORNIA

REPLY TO BRIEF IN OPPOSITION

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ARTIFICE I

Counsel for The State Bar deliberately misstated to this Court Business & Professions Code section 6046.6(d) in order to prevail with regard to Petitioner's contention that it is illegal to scale the FYLSX.

Counsel stated that"In 1986, the State Bar Act was amended to specifically permit scaling to be used on both the General Bar Examination and the First Year Law Students Examination, for the purpose of maintaining and examination of uniform difficulty from year to year.(Bus.& Prof. Code, section 6046.6)" (emphasis added) (Brief for Respondent in Opposition, p.11, 12)

Business & Professions Code section 6046.6(d) provides:

> Scaling may be used on the bar examination for the purpose of maintaining an examination of uniform difficulty from year to year. (added by Stats. 1986, c. 1392, section 3)

Business & Professions Code section 6068(d) provides:

> It is the duty of an attorney:
> (d) To employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law.

Counsel for State Bar intentionally misled this Court by misstating the law in order to gain an advantage. This amounts to a fraud upon this Court, and pursuant to California Law, subjects counsel to disbarment or suspension.

> But when in a disbarment proceeding it is established by evidence amounting to proof that an attorney and counselor has deliberately been

> dishonest in dealing with the affairs of his client, and has violated the duty which he owes to "never seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law" (sec.282, subd.4, Code Civ. Proc.), and when judgment of the Supreme Court is invoked upon such facts, then a refusal to order disbarment amounts to a renewal of the original license, and is a declaration that in spite of his own record, the attorney is fit to be offered to the public as one who safely may be trusted. In this case the court has no reasonable alternative. The petitioner has disbarred himself.(emphasis added)
>
> Roark v. State Bar
>
> 5 Cal.2d 665, 668-69 (Cal. 1936)

Counsel for State Bar also misled the Supreme Court of the State of California by deliberately misstating Business & Professions Code section 6046.6(d) in its Brief for Respondent In Opposition to Petition For Writ of Review, page 8. (Dated: May 30, 1995) If the Supreme Court of the State of California relied on Counsel's misrepresentation, then Petitioner's inability to practice law is a direct result of Counsel's wilful disobediance of his duties.

Counsel for The State Bar should be held to the highest of professional standards, as they represent the administrative arm of the Supreme Court of the State of California. Counsels' actions should result in their disbarment.

ARTIFICE II

Counsel for The State Bar again misled this Court by stating that "In order to pass either the June 1994 FYLSX or the

October 1994 FYLSX, it was necessary to receive a total scaled score of 560 points or 70%of 800."(emphasis added) (Brief for Respondent in Opposition,p.14) There are no published rules stating that a total scaled score of 70% is required to pass the FYLSX.

The Rules Regulating Admission to Practice Law in California as well as the Instructions for Applicants First Year Law Students' Examination state that a 70% is a passing grade on the FYLSX. See Rule VIII section 1(b). This would be true if the actual scores were not arbitrarily scaled DOWNWARD by the Committee.

In choosing to attend Oakland College of Law, Petitioner knew that passing the FYLSX was a requirement for taking the General Bar Examination. Petitioner reasonably relied on the representation of the Committee of Bar Examiners that a 70% was a passing grade.

A 70% would seem to be a realistic score that is easily achievable by a student who studies hard, makes the Dean's List of Honor Students, takes a bar review course, and takes considerable time off from work to prepare for the FYLSX. Petitioner was therefore completely surprised to find that the Committee arbitrarily scaled his score downward by 16.57 points. Petitioner was also surprised to discover that General Bar Applicants are given significantly more time to answer similar essay questions.

The Committee has committed fraud by misrepresenting the passing score for the FYLSX. Petitioner reasonably relied on this misrepresentation, and as a result has suffered damages. This is like winning the Super Bowl by 3 points, and then having the National Football League scale your score downward by 7 points because your a better team.

ARTIFICE III

Petitioner made two requests for evidence to support his contentions that the Committee was arbitrarily fabricating the scaling formulas for the FYLSX without any regard to established mathematical principles.

"I therefore request the mean and standard deviation carry-over numbers for the June 1986 FYLSX through the October 1994 FYLSX's. This evidence will either prove or disprove my allegations." (Letter to Adam S. Ferber, dated April 9, 1995.) Mr. Ferber responded on behalf of the Committee by letter dated April 12, 1995, denying Petitioner's request.

On August 11, 1995, Petitioner again wrote to Adam Ferber requesting evidence to support his Petition to the Supreme Court. The letter stated in part:

> I currently have a Petition for Review before the California Supreme Court from the Denial of Committee of Bar Examiners to Certify Applicant as having passed the First Year Law Students Examination. (Case Number SO46472)
>
> It should be apparent that the requested information is extremely relevant in supporting my position in this matter. All scaling formulas for the FYLSX as well as the General Bar Examination are public information. It seems only logical that the numbers used to arrive at these scaling formulas can be provided without violating any law.
>
> As the United States Supreme Court stated in United States v. Proctor & Gamble,"Modern instruments of discovery serve a useful purpose * * *. They together with pretrial procedures make a trial less a game of blindman's bluff and more a fair

contest with the basic issues and facts disclosed to the fullest practicable extent." 356 U.S. 677, 682 (1958).

Counsel for The State Bar responded on behalf of Mr. Ferber by letter dated August 24,1995, essentially denying Petitioner's request. Concealment of material information in these proceedings amounts to a fraud upon the Courts.

> An attorney is obligated to "employ, for the purpose of maintaining the causes confided to him such means only as are consistent with truth, and never to seek to mislead the judge or any judicial officer by an artifice or false statement of fact or law." (Bus. & Prof. Code, section 6068, sub. (d); see also rule 7-105, Rules Prof.Conduct, for a similar statement.) The quoted statute "unqualifiedly require[s] an attorney to refrain from acts which mislead or deceive the court." (citation omitted) It is settled that concealment of material facts is just as misleading as explicit false statements, and accordingly, is misconduct calling for discipline. Di Sabatino v. State Bar
> 27 Cal.3d 159, 162-63 (Cal. 1980)

ARTIFICE IV

Dr. Klein's declaration deceives the Courts, and is nothing more than a clever attempt to avoid the issues raised by Petitioner.

Scaling formulas take the "[f]ollowing form: Scale=a(raw score)+b.The procedures for computing the values of "a" and "b" in this formula correspond with those used to derive the scaling formula for the multiple choice portion of the FYLSX." (Klein Declaration, p.8.) Peti-

tioner believes that the procedures for computing the values of "a" and "b" require knowing the raw score mean and standard deviation scores of the previous and current test, as well as knowing the scaling formula for the previous test. With this information, the current scaling formula can be computed. See Chapter 15, Scales, Norms and Equivalent Scores in Educational Measurement (second edition) edited by Robert L. Thorndike (1971, American Council on Education, Washington, D.C., especially pp.562-597).

Petitioner also believes that the first scaling formula in a series is arbitrarily chosen. The values for the first raw score mean and standard deviation numbers are arbitrarily chosen and assigned. See Scales, Norms and Equivalent Scores in Educational Measurement at page 513. Perhaps this is why the FYLSX scores are on average scaled DOWNWARD by more than 3% and the GBE scores are on average scaled UPWARD by more than 9%. Dr. Klein has provided no explanation for this significant disparity in scaling formulas between the General Bar Examination and First Year Law Students Examination. A wise move.

Dr. Klein makes a fundamental error in assuming Petitioner is proposing the proper scaling formulas to be used on the FYLSX. Petitioner is simply making observations about the effect of the scaling formulas on the GBE and the FYLSX. Petitioner's proposal for future administrations of the FYLSX is that only three essay questions should be given in a three hour session, as well as the 100 item multiple-choice portion of the test. Scaling should not be applied as there is no legal authority to do so. The overall passing grade should be 65% as this is consistent with the raw scores needed to pass the GBE.

Petitioner stated that applicants taking the GBE are given 14+% more time to answer similar essay questions. The formula is ESSAY = (1.1429 X raw). This is an equitable formula, not a scaling formula. This equitable formula can be applied to any administration of the FYLSX to correct for this unfair time advantage. Applying this formula to Petitioner's written score of June 1994:

Written Equitable Score = (1.1429 X 270)	= 308.5830
+ Illegally Scaled Multiple-Choice	= 267.4300
TOTAL EQUITABLE/SCALED SCORE	= 576.0130

If scaling is not applied to the Multiple-choice portion, then:

Written Equitable Score	= 308.5830
+ Unscaled Multiple-Choice	= 284.0000
TOTAL EQUITABLE SCORE	= 592.5830

Petitioner has not even applied General Bar Examination scaling formulas to raise his score, yet Petitioner's score of 592.5830, which is 74.07% of the total possible grade, is clearly passing. It could be said that Petitioner has a better than average chance of passing the General Bar Examination. "Indeed, one of the primary purposes of the FYLSX is to give applicants some indication of the quality of their education, so they can measure their likelihood of success on the general bar exam. (Bible, 26 Cal.3d at 544.)" (Brief for Respondent in Opposition, p.9)

Perhaps Dr. Klein is responsible for arbitrarily fabricating the scaling formulas on the FYLSX. "Following the amendment to the State Bar Act, the State Bar's Committee of Bar Examiners, with guidance from an expert in the field, in February 1987 instituted a grading

procedure for the General Bar Exam (GBE) that included the scaling of the scores on the multiple choice, or multi-state bar exam (MBE) portion of the exam." (Brief for Respondent in Opposition,p.12-13)

In 1987, a pattern of four arbitrarily chosen FYLSX scaling formulas emerges. See Appendix A. This pattern begins with "guidance from an expert in the field." This expert is more than likely responsible for the arbitrarily chosen FYLSX scaling formulas.

Petitioner can easily predict from Appendix A that the scaling formula for the June 1996 FYLSX will be (3.33xRaw) +31. An applicant taking the June 1996 FYLSX who receives a raw score of 70 (passing) on the multiple-choice portion of the test will end up losing 16 points after the Committee scales his or her score downward. An applicant who receives 70% on the essay portion of the FYLSX and a 70% on the multiple-choice portion of the FYLSX will fail the test.

CONCLUSION

"Petitioner has failed to demonstrate that the Committee's actions were erroneous."(Brief for Respondent in Opposition, p.7) Not only are the Committee's actions erroneous, they are illegal. Counsel for The State Bar has attempted to cover up these actions by deceiving the Courts and withholding evidence.

The Supreme Court of the State of Calfornia had a duty to listen to Petitioner's complaint. "In accordance with our duty to undertake an independent examination of the evidence in cases of this kind (citations omitted), we proceed to a consideration of the record." Siegel v. Committee of Bar Exam.,State Bar of Cal., 10 Cal.3d 156, 160 (Cal. 1973).

"The applicant bears the burden of showing that the committee's findings are not supported by the evidence or 'that its decision or action is erroneous or unlawful,' but all reasonable doubts are to be resolved in his favor. (citations omitted)" Id. at 173.

This case on the merits is quite simple. The Committee has simply rigged the FYLSX by arbitrarily fabricating scaling formulas. The Committee's actions were erroneous, illegal, and fraudulent. The evidence supports this finding.

The actions of Counsel for The State Bar in covering up the Committee's action was also illegal. Given the overwhelming amount of evidence to support Petitioner's position, no administrative agency or court in the State of California has provided Petitioner with the most basic of hearings in this matter.

In a disbarment proceeding, Counsel would no doubt demand a hearing, and would be entitled to procedural due process.

> [A] court may not summarily disbar an attorney without notice and hearing, even when the disbarment results from a charge of contempt for which the court gave the attorney notice,an opportunity to prepare, and a hearing. (citations omitted) Miranda v.Southern Pacific Transp.Co 710 F.2d 516, 522 (9th Cir. 1983)

Petitioner has in effect been summarily disbarred before even getting the chance to practice law. Petitioner should be entitled to procedural due process in this matter, just as Counsel would expect a hearing in a disbarment proceeding.

> Petitioner was clearly entitled to notice of and a hearing on the grounds for his rejection either before the Committee or before the Appellate Division. (citations omit-

ted) There seems no question but that petitioner was apprised of the matters the Committee was considering.

> "But a 'full hearing'--a fair and open hearing--requires more than that. * * * Those who are brought into contest with * * * Government in a quasijudicial proceeding aimed at the control of their activities are entitled to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."(citations omitted)

Petitioner had no opportunity to ascertain and contest the bases of the Committee's reports to the Appellate Division, and the Appellate Division gave him no separate hearing. Yet, "[t]he requirements of fairness are not exhausted in the taking or consideration of evidence,but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps." (citations omitted)

Willner v. Committee on Character and Fitness
373 U.S. 96, 105 (1963)

For the reasons set forth above, a writ of certiorari should issue to review the Order of the Supreme Court of California in this matter.

DATED: March 5, 1996

Respectfully submitted,

Kenneth Owen
KENNETH OWEN

FYLSX MULTIPLE-CHOICE SCALING FORMULAS

FYLSX	SCALING FORMULA	ACTUAL SCORE	SCALED SCORE	SCALED SCORE%
OCT 87	(2.90xR)+64	70	267	66.750%
JUNE 88	(3.33xR)+31	70	264.1	66.025%
OCT 88	(3.50xR)+37	70	282	70.500%
JUNE 89	(2.60xR)+90	70	272	68.000%
OCT 89	(2.90xR)+67	70	270	67.500%
JUNE 90	(3.33xR)+31	70	264.1	66.025%
OCT 90	(3.50xR)+37	70	282	70.500%
JUNE 91	(2.60xR)+90	70	272	68.000%
OCT 91	(2.90xR)+64	70	267	66.750%
JUNE 92	(3.33xR)+31	70	264.1	66.025%
OCT 92	(3.50xR)+37	70	282	70.500%
JUNE 93	(2.60xR)+90	70	272	68.000%
OCT 93	(2.90xR)+64	70	267	66.750%
JUNE 94	(3.33xR)+31	70	264.1	66.025%
OCT 94	(3.50xR)+37	70	282	70.500%

The average scaled score as a percentage in the above fifteen administrations = 67.856%

The scaling process on the FYLSX results in a score that is on average scaled DOWNWARD 3.063%

APPENDIX A